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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 195

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

STATE INVESTMENT COMPANY AND EDWARD B. WHEELER, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

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San Francisco, California.
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CHAS. W. G. WARD,
East Las Vegas, New Mexico,
Solicitors for Appellees.

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BRIEF FOR APPELLEES.

Introduction.

This suit was commenced by the appellant to quiet its claimed title to a strip of land in New Mexico. The appellant asserts that the strip in dispute lies to the west of the west boundary of the Mora Grant, a much larger area which

was patented by the United States—the present appella
on August 15, 1876, to the predecessors in title of
appellees herein. The appellees, on the other hand, a
that the disputed strip lies to the east of that west boun
and, therefore, is within that grant as the same was pate
Neither the issues made by the pleadings nor any o
issues litigated below raise or involve the validity o
United States patent or question its conclusiveness ag
the Government. Whether the strip lies to the east
the west of the west boundary of the Mora Grant raise
one question of fact in this suit, which is, Where upo
earth's surface is the west boundary of that grant?
question emerges from a conflict between the calls o
patent for natural objects and monuments, on the
hand, and for distances, on the other. Appellant doe
question either the general rule that natural objects
monuments control distances, nor the ruling of the
court in so holding in this case; nevertheless the app
claims that the true west boundary of the grant is a lin
by Deputy United States Surveyor Compton in 1909, w
admittedly does not respond to a single patent call for na
objects, monuments, courses, or distances. The app
on the other hand, claim that the true west boundary
grant is a line run by Deputy United States Surveyor W
in 1902, which responds perfectly to the patent call
natural objects, monuments, and courses.

The salient features of the claims of the parties a
the situation developed by the evidence are graphi
shown in the sketch map which appears as the frontis
to this brief.

The appellees got a decision in the trial court, whic

affirmed by the Circuit Court of Appeals (285 Fed., 128). To reverse these concurrent decisions of the two lower courts upon the single question of fact above stated is the purpose of the appeal now being prosecuted by the United States.

Statement.

The Mora Grant was originally made by the Republic of Mexico in 1835. Pursuant to section 8, chapter 103, of the Act of July 22, 1854, 10 Stat., 308, (*a*) the Surveyor General of New Mexico ascertained its "origin, nature, character and extent" and reported thereon to Congress, num-

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(*a*) Sec. 8, c. 103, 10 Stat., 308, reads as follows: "*And be it further enacted*, That it shall be the duty of the Surveyor General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

bering the claim as thirty-two in his report. The
on June 21, 1860 (12 Stat., 71), Congress confirm
grant. (*b*) In the Mexican proceedings and, as
the patent subsequently issued by the United States
114, fol. 132) its boundaries are described in these
terms: "On the North the Ocate river; on the S
where the Sapeyo (Sapello) empties; on the East the
de la Yegua, and *on the West the Estillero.*" (Ital
plied.) On August 15, 1876, the United States
ment issued its patent for the grant, (*c*) basing
an official survey thereof made in 1861 by one
Means, a deputy United States surveyor.

The United States patent also describes the g
accordance with the Means survey and fixes the n
corner at a point "inaccessible in the mountains
set," ten miles forty chains and fifty-four links w

(*b*) Section 3 of the Act of June 21, 1860, c. 167, 12 Stat.,
as follows: "*And be it further enacted*, That the private la
in the Territory of New Mexico, as recommended for confirm
said surveyor-general in his reports and abstract marked E
as communicated to Congress by the Secretary of the Interi
letter dated the third of February, eighteen hundred and s
numbered from twenty to thirty-eight, both inclusive, be,
same are hereby confirmed, with the exception of the claim
twenty-six, in the name of Juan B. Vigil, which claim,
twenty-six, is not confirmed."

(*c*) Authority for the issuance of the patent is found in
of March 3, 1869, Sec. 2, c. 152, 15 Stat., 342, as follows: "
further enacted, That the Commissioner of the General La
shall, without unreasonable delay, cause the lands embrace
several claims to be surveyed and plotted, at the proper e
the claimants thereof, and upon the filing of said surveys
in his office he shall issue patents for said lands in said
which have heretofore been confirmed by acts of Congress
veyed, and plats of such survey filed in his office as afor
for which no patents have heretofore been issued."

large mound of earth raised on the north boundary; and then (R., p. 133, fol. 154), for the west boundary proper, upon the location of which this case turns, the patent description, paragraphed here for convenience of reference, continues as follows:

(1) "Thence south from said point for northwest corner. At thirteen miles seven chains forty-one links on course, or one hundred and three miles forty-three chains sixty-nine links from beginning, *a stone thirty by nineteen by seven inches in size in large mound of stones and marked W. B. M. G. and on West side EO.*,

(2) "from which mound an aspen tree twelve inches diameter bears north seventy-four and one-half degrees East one hundred and seventy links distant which tree bears cut in it the letters W. B. M. G. and *the word Estillero*

(3) "and from which mound a pine tree seventeen inches diameter bears north three hundred and seventy-one links distant and which tree bears cut in it on the East side the letters W. B. M. G. and *the word Estillero*

(4) "and at the East side of which tree is *a stone twenty by twelve by three inches in size in a mound of stone and marked* W. B. M. G.

(5) "At thirteen miles nine chains seventy-one links *a trail to Picuris*, bearing northwest.

(6) "At thirteen miles twenty-five chains fifty-nine links *the Pueblo River* bearing northwest and southeast.

(7) "At thirteen miles forty-one chains ninety-one links at foot of a high mountain *a stone eighteen by twelve by five inches in size in a mound of stones and marked W. B. M. G.*

(8) "At thirty-three miles thirty-three
twenty-nine links on course or one hundre
twenty-three miles sixty-nine chains fifty-seven
from beginning, Southwest corner of the Mora
a stone twenty by fourteen by six inches in siz
mound of stones and marked S. W. C. M. G
standing on edge of a high mountain on left
of the Sapello river one hundred and fifty-two
north of the stream." (Italics supplied.)

Disregarding the trees, which have naturally disap
during the lapse of time since 1861, when Means s
marked them, the patent description of the west bound
the grant calls for three objects the location of each of
upon the earth's surface definitely fixed and
ascertainable beyond the possibility of mistake, na
First, *the Estillero,* called for by the EO stone men
in item (1) above and by the name "Estillero" cut on
ing trees mentioned in Items (2) and (3), and also
for by the Mexican grant description—"on the we
Estillero"—which is incorporated in the patent (R., p
fol. 132); secondly, *the trail to Picuris,* called for in
(5), and, thirdly, *the Pueblo River,* called for in Iten
The description calls also for four permanent monu
three of which, as it will presently appear, are found
on the earth's surface substantially in accordance wit
calls of the patent, namely: First, *the stone marked*
M. G. on one side and EO on the other, called for in
(1) above; secondly, *the stone marked W. B. M. G.,*
for in Item (4), and, thirdly, *the stone to the south*
Pueblo River marked W. B. M. G., called for in Iten
The fourth stone, the one mentioned in Item (8) abov
never been found.

The story of the original location of the west boundary of the grant is related by Means in his field-notes. Reference to that source discloses that the Estillero was pointed out to him by Jose Francisco Paiz, Manuel Antonio Paiz, and Antonio Lopez. Means went there (R., p. 97, fol. 113; p. 107, fol. 124) and ascertained it to be a portion of the valley of the Pueblo River through which ran a horseback trail known as the trail to Picuris. In the Estillero he erected and marked three stone monuments to designate the west boundary and ran a line north and south through them. He placed two of the monuments on the north side of the Pueblo River and the third on the south side. The north-and-south line then ran by him was about half a mile in length and crossed both the Pueblo River and the trail to Picuris. His field-notes describe the monuments, their markings and location, and their distance from each other and from the Pueblo River and Picuris trail (R., pp. 107, 108, fols. 124, 125). Although the west boundary is more than thirty miles long, the north and south line in the Estillero, between the stones there set and marked, was the only portion of it which Means actually surveyed or measured. The country through which the west line runs consists of high mountains, some of them over 10,000 feet high, and in 1861 it was wild, uninhabited and quite inaccessible, the only thoroughfare being the horseback trail already mentioned. Means reported that it was impossible to run his survey through this difficult stretch (R., p. 108, fol. 120; p. 109, fol. 126, and p. 111, fol. 128); he therefore calculated the distance north and south from the Estillero and reported the length of the west boundary as thirty-three miles thirty-three chains and twenty-nine links (R.,

p. 133, fol. 125). The Means survey was approved by the Surveyor General (R., p. 136, fol. 157).

The record herein shows that the first attempt to make an actual survey and location of the entire west boundary of the Mora Grant was in 1902, when the Commissioner of the General Land Office instructed J. H. Walker, a deputy United States surveyor, to survey it. His instructions were to go to the Estillero (the place in which Means reported he set his stones on the west boundary) and run a north and south line through it. Walker went there and found two of the stones which Means reported he had marked. He ascertained that they were in the correct location on the Pueblo River and in the proper relation to each other; he then ran a north-and-south line through them and actually carried it to its points of intersection with the north-and-south boundaries of the grant (R., p. 35, fols. 42, 43; p. 35, fol. 44; p. 47, fol. 45).

In 1909—seven years after Walker officially visited the Estillero—Alonzo E. Compton, also a deputy United States surveyor, was instructed to retrace the east line of certain public-land townships, which were established long after the grant patent was issued, by starting at a stone on the Sapello River, which is a part of the south boundary of the Mora Grant, and projecting a line north to the north boundary. In running this line Compton did not attempt to run the west boundary of the Mora Grant according to the patent description of that boundary (R., p. 20, fol. 24). It was not, he said, a part of his official mission to try to make his line conform to the lines called for in the patent (R., p. 20, fol. 25).

The distance between the line run by Compton in 1909 and

the west boundary of the Mora Grant as ascertained by Walker seven years earlier is about three and one-half miles, the Compton line being about that distance east of the west boundary as ascertained by Walker. The Government claims (R., p. 3, fol. 4) that the Compton line is the true west boundary of the grant. Neither in its pleadings nor in either of the lower courts did it advance any other claim to the tract in dispute, nor did it suggest any other boundary. Parenthetically it may be noted that in this court the Government changes its hold somewhat and attacks the correctness of the Means survey, upon which the patent issued in 1876, and asks that a new survey be ordered. But as no direct attack upon the patent is made or can be legally attempted now, that "instrument of quiet and security" is conclusive here and the Government must stand or fall on its original claim that the Compton line of 1909 is the true west boundary of the Mora Grant; and to sustain that claim it must prove the Compton line to be the boundary called for by the patent. The appellees contend that the west boundary described in the patent must, when located, be a due north and south line through the Means monuments in the Estillero; and that the Walker location of the west boundary conforms to those requirements.

The Compton line, claimed by the Government, does not conform to the distance requirements of the patent, nor does the Walker location do so. The reason for this discrepancy is that there exists a conflict between the natural objects and monuments called for by the patent (*i. e.*, the Pueblo River, the Estillero, the trail to Picuris, the EO stone and the stone south of the river) and some distances given in that instru-

ment. The theory of the appellant seems to be that as
Compton survey of 1909 was approved by the Surveyor G
eral and the Walker location of the west boundary was
it—the Compton survey, an *ex parte* survey made s
thirty-three years after the issuance of the grant paten
must constitute the true west boundary of the grant; and
despite the established and admitted fact that the Comp
survey does not conform to a single natural object, mo
ment, course, or distance specified in the patent, but was
in utter disregard of the patent description of the west bou
ary. In the situation presented by the facts of this cas
is the theory of the appellees that natural objects and mo
ments must control and that distances must yield according

Statement of the Argument.

I.

The appellant has not shown that the District Court or
Circuit Court of Appeals erred as to the effect of the evide
herein, and therefore, on appeal, this court, in accorda
with its established rule and settled doctrine, will follow
concurrent decisions of the lower courts.

II.

The calls of the patent for natural objects and monume
control the calls for distances.

III.

The traverse line from Upper Mora to the Estillero is n
proper matter for consideration; but, if considered, it wo
against the contentions of appellant.

IV.

The trial court did not commit error in limiting the effect of the plats and field notes of official surveys of townships adjoining the Mora Grant, nor in excluding land decisions as to the location of the west boundary of the grant.

V.

That the courts have neither original power nor power concurrently with the Land Department to correct surveys, is an elementary principle of our land law.

VI.

Such statements in appellant's brief as are not based on the record will doubtless not be given consideration.

ARGUMENT.

THE APPELLANT HAS NOT SHOWN THAT THE DISTRICT COURT OR THE CIRCUIT COURT OF APPEALS ERRED AS TO THE EFFECT OF THE EVIDENCE HEREIN AND, THEREFORE, ON APPEAL THIS COURT, IN ACCORDANCE WITH ITS ESTABLISHED RULE AND SETTLED DOCTRINE, WILL FOLLOW THE CONCURRENT DECISIONS OF THE LOWER COURTS.

The question of fact upon which this case turned in the trial court and in the Circuit Court of Appeals, and upon which it will doubtless turn in this court, is, Where upon the earth's surface is the west boundary of the Mora Grant? Stated in another aspect the question is, Does the strip of

land here in dispute lie to the east or to the west of the tru west boundary of the Mora Grant? These questions ar questions of fact. *Russell v. Maxwell Land Grant Co.*, 15 U. S., 253, at p. 259. The trial court held that the wes boundary of the grant is a north-and-south line through the stone monuments in the Estillero; that the Walker survey and ascertainment of that line in 1902 are coincident and coextensive with the west boundary described in the patent; and, in consequence, that the strip of land here in dispute lies to the east of that true west boundary and within the grant as patented by the United States (R., pp. 63, 64, fol. 76). On appeal, the Circuit Court of Appeals for the Eighth Circuit affirmed the decree of the trial court. Thus, there are here presented for review and reversal the concurrent decisions of two inferior courts, in the same case, upon a disputed question of fact.

With respect to such a situation, this court, in *Towson v. Moore*, 173 U. S., 17—a suit in equity to set aside a gift as having been obtained by undue influence, and for an accounting—has said:

> "A series of decisions of this court has established the rule, that successive and concurrent decisions of two courts in the same case, upon a mere question of fact, are not to be reversed, unless clearly shown to be erroneous. This rule, most often invoked in admiralty, is yet equally applicable to appeals in equity" (p. 24).

And four years after the decision of the Towson case, this court reiterated the rule there enunciated by Mr. Justice Grey, saying, in *Brainard v. Buck*, 184 U. S., 99, 105, a

suit for an injunction, to declare a trust and to compel the making of certain conveyances of title:

> "Upon the merits of the case, the two courts below have come to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been repeated and affirmed in the Court of Appeals, and we are now asked to review and reverse these findings, upon the testimony contained in the record. It ought not to be done in this case. *It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous.*" (Italics supplied.)

Nor is the rule announced in the Towson and Barnard cases to be overthrown "merely upon a doubt created by conflicting testimony" (*Morewood v. Enequist*, 23 How., 491, at p. 495), nor "merely by raising a doubt founded on the number and credibility of witnesses;" nor will it do "to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found in the record to establish the one that was rendered." *The Ship Marcellus*, 1 *Black*, 414, *at p.* 417. Finally, if it does not *clearly* appear that the lower courts erred in their conclusions of fact, the Supreme Court will accept their finding as "indisputable." *The Carib Prince*, 170 *U. S.*, 655, *at p.* 658.

Within the "established rule" and "settled doctrine" of this court has the appellant presented a reversible case on the facts? Answering, we turn to an examination of the evidence shown in the record.

The appellant, having under its pleadings the burden of showing that the so-called Compton line of 1909 is the true west boundary of the Mora Grant, introduced the testimony of Compton himself (R., pp. 15-29, fols. 19-35; pp. 54, 55, fols. 65, 66). Generalizing the testimony of this witness, it appears that "he accepted as the southwest corner" of the Mora Grant (R., p. 16, fol. 20), a sandstone 18 x 12 x 5 inches, which he says was 199 chains, 55 links west, and 73 chains, 16 links north of the northwest corner of the Las Vegas Grant, as re-established by Frank M. Johnson in 1899. (R., p. 11, fol. 15.) From this initial stone, which was not a marked stone (R., p. 23, fol. 28), the witness ran north three degrees, eight minutes west, and at 8.95 chains intersected the closing corner of Sections 2 and 11, Township 18 North Range 14 East; thence north one degree, fifty-eight minutes east, and at 86 chains and 42 links he intersected the closing corner of Sections 2 and 35, Townships 18 and 19, North Range 14 East; thence due north until he intersected a line projected due west from what he *assumed or concluded* was the last meander corner established by Means on the north boundary of the Mora Grant. The total distance run by the witness was thirty-one miles, seventy-five chains (R., pp. 16, 17; fols. 20, 21), more than two miles less than the patented length of this boundary.

Compton admitted that the line run by him did not cross either the Pueblo River or the Estillero, that its nearest point was "perhaps a mile distant" (R., p. 22, fols. 26, 27), and also that he found none of the marked stones or bearing trees called for by the patent and the Means field notes (R., pp. 21-23, fols. 24-29). Finally, and in the face of

the patent call for a due north and south line, he stated that he did not run an exact north and south line for the west boundary, but angled somewhat to the east; and that "he never ran the west boundary of the grant as such, as he was acting under specific instructions from the Department to project that line"—that is, the line he did project (R., p. 23, fol. 28). He "did not attempt to make his survey conform to the patent; could not say that he made attempt to have western boundary of grant conform to patent. In fact, he had not seen that part of the patent and did not have it with him" (R., p. 19, fol. 25).

This Compton line,—which touched no natural object or monument called for by the patent, and which was at its nearest point "perhaps a mile distant" to the east from the Estillero, and in the running of which no attempt was made to follow the description of the west boundary contained in the patent—this line, we repeat, is claimed by the Government to be the true west boundary of the Mora Grant.

The appellees, desiring to show a boundary line conforming to the requirements of the patent, introduced the testimony of J. H. Walker, who like Compton, was a deputy United States surveyor at the time he made his survey and ran out the so-called Walker line in 1902, under directions, be it noted, from the Commissioner of the General Land Office to go to the Estillero and run a line north and south through it (R., p. 34, fol. 42).

Walker went to the Estillero and there found two of the stones marked by Means. One of them, to the north of the Pueblo River, was pointed out to him by one Casimiro Pais (R., p. 34, fol. 42), who had lived in the Estillero a great

many years, and who is a son of one Jose Francisco Pa who, with J. Cordova, built a fort in the Estillero so time during the period 1861 to 1866 (R., p. 46, fol. 5 The stone shown to Walker by Casimiro Pais was at right of the road at the lower end of the Estillero Valley a up just a short distance on the slope of the hill—probab a hundred yards up the hill above the foot of the mounta (R., p. 37, fol. 45). When Walker first saw the stone had fallen to the ground. He examined it, and, on tu ing it over, found on the under side, and "easily legibl the letters EO. Thereupon he re-examined the upper or posed side and found the letters W. B. M. G. They h grown full of rock moss and were difficult to distingu at first, but on close examination they were "perfectly d tinct." As the stone lay on the ground when Walker fi saw it, it would, he said, be revealed only on close exami tion. The entire exposed surface was covered with r moss; and the marks on the stone "must have been qu old, because that moss takes a long time to grow on a ston (R., p. 35, fol. 42). Walker had with him a copy of t field notes of Means' location of the EO stone which t latter said he had placed at the Estillero; and the measu ments of the stone and the Pueblo River agreed very clos with the distance given by Means (R., p. 35, fol. 43).

Walker also saw the trail to Picuris, going south fr the EO stone and before reaching the Pueblo River. It w very faint at that point, but he measured the distance tween the EO stone and the trail and "it agreed very clos with that given by Means" (R., p. 35, fol. 43). But Mea had said in his notes (R., p. 108, fol. 125) that he also a stone south of the Pueblo River and 34 chains 50 lin

distant from the EO stone, and had marked it W. B. M. G. So from the EO stone Walker measured off thirty-four chains and fifty links south and across the Pueblo River, and at the end of that distance he found another monument, a stone marked W. B. M. G. He saw a few scattered stones near this second stone "as evidence that it had been a monument" (R., pp. 35, 36, fol. 43).

Walker also examined the topography and found that it agreed with that given by Means in his field notes. He also ran a line to the south of the south stone and found the character of the country "very mountainous"; and on running a line to the north of the north or EO stone he found the country "extremely mountainous." There was a high mountain at the place where he found the EO stone and that stone "was right at the foot of a mountain as Means' notes called for." It was quite mountainous where the south stone was found (R., p. 36, fol. 43).

As to the third stone, Jones (R., p. 53, fol. 54) testified that he found an old stone marked W. B. by Means.

The whole valley in which the stones were found by Walker is called the Estillero Valley. Walker says it begins on the north at Angostura de los Caballos, that is, the narrow pass, and extends in a general northwest and southeast direction, and is not a wide valley. (R., p. 37, fol. 45.)

That the stones found by Walker at the time of his official survey in 1902 are the identical stones set in the Estillero and marked by Means in 1861, is made apparent by the uncontradicted testimony of many other witnesses.

Casimiro Paiz, it will be recalled, pointed out the EO stone to Walker in 1902. His father before him, Jose Fran-

cisco Paiz, and his uncle, Manuel Antonio Paiz (both d
many years, R., p. 50, fol. 60) had pointed out the Estil
to Means in 1861 (R., p. 107, fol. 124). Casimiro and
father, Jose Francisco, were personally known to Pedr
Duran, a witness for appellees, whose own father had
stock which frequently got into the Estillero. Into
little valley Pedro would go to hunt them, and in doin
he "frequently traveled the Picuris trail that ran thro
the Estillero." His father pointed out the EO stone to
for the first time in 1866 or 1867. It was on the right h
side of the road coming from the Angostura de los Cab
to Mora, "about sixty or seventy yards from the road u
the hill," and not far from the house of Clemente Ma
(R., pp. 45, 46, fol. 55).

For fifty years Clemente Maestas knew the Estillero
for fifteen years he lived there in a house located about
hundred yards from the Angostura de los Caballos and s
three hundred yards west of the Estillero Spring. Like
father of Duran, Maestas' father also had cattle in t
which the younger Maestas took care of. "They would g
in the Estillero, and go along the Picuris trail to Mo
For thirty-five or forty years Maestas has known the st
near the Estillero Spring (the EO stone), has seen it at
tervals during that period, *and knows that it is now in
same place as when he first saw it.* Moreover, he has kn
of the stone on the south side of the Pueblo River for
same length of time (R., p. 47, fol. 56).

Antonio J. Romero, subpœnaed by plaintiff but calle
the stand by defendants, said he was eighty-two years
and lived in the Valle de Arriba (Upper Valley); that
knew Casimiro Paiz and also Jose Francisco Paiz; that he

known the country around the Angostura de los Caballos and the Valley of the Pueblo River since he was seven years old. He also knows the Picuris trail and the house where Clemente Maestas lives. Casimiro Paiz once lived there. He, Romero, was with J. Cordova and Jose Francisco Paiz some time between 1861 and 1866 when they were building a fort in the Estillero, about five hundred yards from the Maestas house. They told him that they were building it there "on account of the grant line," and that there was a mound of stones over across the river. This mound Romero saw "often as he went by along the road." "The place was known as the Estillero in those years" (R., p. 46, fols. 55, 56).

Jesus Medina, seventy, a resident of Chacon, above Mora, has known the Estillero and the Angostura de los Caballos for fifty years; and in 1868 or 1869, for the first time, he saw from the Picuris trail a stone about one and one-half feet high located about one hundred yards from the Estillero Spring. "The country from the Angostura (de los Caballos) up to the Canon Abequesenos has always been called the Estillero; never heard of any other place called the Estillero" (R., p. 47, fol. 57).

And two other old men, Juan Andres de Luna and Hemerejildo Vigil, each seventy-two, the first a resident of the Valley of Canoncito since he was nine or ten years old, and the second, formerly a resident in the Estillero in a house he built there in 1886, have known the Estillero and the EO stone since the early years. Vigil has known the Estillero "since he was old enough," also the Estillero Spring and a mound of stones nearby. This mound he first saw some time during the years 1866-1868, when there was a marked stone in the ground about one hundred or one hundred and

fifty yards from the Estillero Spring near the Picuris
De Luna has known the Estillero and the Estillero Sp
since 1874. The trail to Picuris crosses on the upper
and close to the spring, he said, and in those years there
a mound of stones a hundred or a hundred and fifty
northeast of the spring. Both Jose Francisco Paiz and
son, Casimiro, called his attention to this stone. Vigil
the Estillero extends from the Angostura de los Caball
Los Alamitos; de Luna, that it is the Valley of the Esti
through which the Pueblo River runs (R., pp. 47, 48
57; p. 49, fol. 59).

Segundo Garcia, sixty-five, and a resident of Holma
his life, also said he knew the Estillero on the Pueblo R
likewise the Estillero Spring. The latter is, he testifie
front of the fort where Clemente Maestas lives; and
Picuris trail passes by it, and there is a mound of stone
it which he first saw about 1876. Moreover, all this v
from Alamitos to Alcahuize is called the Estillero (R
48, fol. 58).

The appellant offered no testimony tending to contr
the testimony of these six old residents of the Estillero
nearby places. One of appellant's witnesses, Father Cl
Ballan, admitted that he had heard the term Estillero
plied as including the Alamitos and the whole valley be
the Angostura de los Caballos (R., p. 55, fol. 66); and
Blas Gallegos, said some people say the Estillero "runs
down below" the summit over which the Picuris trail p
(R., p. 56, fol. 66); a third, Pedro Bernal, said that a
as he knew, it extended about a mile down the Pueblo
taking in the Angostura de los Caballos and down to
Clemente Maestas house (R., p. 56, fol. 67); and the fo

Agapito Abeyta, that it extends from the Canon of the Abequesenos down to the Angostura de los Caballos (R., p. 57, fol. 68).

That knowledge of the Estillero itself was not limited to the immediate vicinage of that spot but was rather widespread within less than seven years after Means visited there, is shown by an early reference to the place, definitely fixing its location, which is found in the Act of the Legislature of New Mexico of January 30, 1868, establishing the boundary between Taos and Mora counties. (See Appellant's brief, at p. 16.) The act is still in force (Section 1091, Code 1915), and is in terms as follows:

> "The boundary dividing the Counties of Taos and Mora shall hereafter be as follows, that is to say, west of the Valley of Mora, a line running north, commencing at the first hill west of the said Valley of Mora and east of the Jicarita, *crossing the Vega de Estillero opposite Canada del Raton,* passing through the said Canada until it reaches the foot of the Osha Hill." (Italics supplied.)

From this act several things are apparent. In the first place, the Estillero was evidently a well known location as early as January, 1868 (only seven years after the Means survey), since it was at that time of sufficient prominence to be used as a call on the boundary between two counties. In the second place, it is referred to as the "Vega" of the Estillero, this word meaning meadow and being universally used of land lying along a river, thus corresponding with the situation in the Valley of the Pueblo River described by Means and also by Walker and other witnesses for the appellees. In the third place, the county line is to cross the

Estillero opposite the Canada del Raton. This Canada is a well known place frequently referred to in the record herein, and is definitely located by Surveyor Vincent K. Jones on the map of that portion of the Valley of the Pueblo River which he prepared (R., p. 145). The original exhibit, Defendants' Exhibit A, is before the court for inspection. The Canada del Raton is the northernmost of the two deep canyons shown coming into the Valley of the Estillero from the east. The legislative act, therefore, definitely establishes this point as being within the Estillero.

From the foregoing testimony and the legislative act, it would seem irresistibly to follow that the EO stone found by Walker in the Estillero in 1902 is the same stone as the stone seen there by Casimiro Paiz in 1866 or 1867, by Vigil between 1866-1868, by Medina in 1868 or 1869, which was pointed out to de Luna in 1874 by both Casimiro Paiz and his father Jose Francisco Paiz; and also that it is the same EO stone which Means reported he placed in that spot in 1861, when the Estillero was pointed out to him by Jose Francisco Paiz and Manuel Antonio Paiz.

Here it is not inappropriate to show that even the possibility of any place on the Pueblo River other than the Walker location of 1902 answering topographically and otherwise to the spots called for by Means as the Estillero and as his monument sites is entirely eliminated from the case. Upon this point appellant says in its brief (p. 19) that, "A. E. Compton, a witness for plaintiff, testified that there were a number of places where the stones could have been placed in the valley at the proper distance from the river."

At one place in his testimony (R., p. 27, fol. 33) Comp-

ton did say, flatly, "any number of places could be found along it (the Pueblo River) where the stones could be placed in proper relation," and that at "any point from the mountain divide westward for perhaps two miles, the stones could be moved up and down, he believed." But, he hastened to add that "that was his personal belief;" and that "he had made no survey of the Pueblo River to ascertain the truth of this statement. He didn't make any measurements. He was judging from eyesight by driving along through the valley there." But even this possibility thus raised by Compton's expression of casual opinion, based merely on what he saw while "driving along through the valley there," was eliminated by Vincent K. Jones, a witness for appellees, who ran "several lines through the valley, taking detailed topography of the whole valley, tying onto the different objects" (R., p. 38, fol. 46). Upon the basis of his examinations and measurements this witness made a map (Defendants' Exhibit A) of the Estillero showing correctly the true relative positions of data thereon (R., p. 38, fol. 46). G. D. Kirkpatrick, a Government witness, examined this map "and found it to be substantially correct" (R., p. 53, fol. 63). Jones also made a small map (Defendants' Exhibit E, R., p. 151), to proper scale, showing the relative position of the Means stones, the Picuris trail and other land marks, called for in the patent, with the Pueblo River. This he placed over various portions and locations shown along the Pueblo River on the large map (Defendants' Exhibit A) to show the points of agreement or disagreement with the land marks called for in the patent." He was unable to find any other place on the Pueblo River from the Angostura south that would check

with the topography and Means' calls" (R., p. 39, fol. 47).

Lastly, and conclusively upon this point, the issue here is not as to where Means could have set stones, but as to where he did set them.

Thus far, therefore, it would seem to be clear that Walker actually found in 1902 the exact spot called for in the patent and in Means' field notes as the west boundary of the Mora Grant, and visited and marked by Means in 1861. At all events, Walker, thoroughly convinced by his investigations that he had found the point fixed and marked by Means in 1861, ran a north and south line through the stones for eleven or twelve miles north of the Estillero, where the country was extremely mountainous, and south to the Sapello River, marking the line as far as possible by monuments, marked stones and blazed trees. From the Estillero stones to the Sapello River "the country was something fierce, very mountainous" (R., p. 36, fol. 44).

That the testimony with reference to the location of the Estillero appears to be conclusive in favor of the Walker location thereof is shown by the summary of it made by the District Court in its opinion. That summary, concurred in by the Circuit Court of Appeals in its decision, is as follows:

> "The Estillero, as shown by the evidence is a place in the valley of the Pueblo River extending down the valley of the Pueblo River from the Canon de los Abequesencs or Canon de los Ratones on said river to the Angostura de los Caballos along said river for a distance of about two and one-half miles" (R., p. 59, fol. 71).

If anything further than Means' own statement in his field notes that the Estillero was at or along the Pueblo

River, were essential to prove the place as a definite portion of the valley of that river, the evidence above set out, all absolutely uncontradicted, would supply it. Yet, in the face of this situation, appellant in its brief, on pages 17 and 18, says:

> "The most that can be gathered from the record is that the Estillero is a plain, valley or vega and that it is located somewhere in the range of mountains that Means refers to as constituting the west boundary of the grant. But there is one point not to be overlooked. It was pointed out to Means from the plaza in Upper Mora, and therefore it could be seen from the valley."

Again, on page 17 of its brief, appellant says:

> "Means in his field notes refers to it (the Estillero) as a low place in the mountains pointed out to him from the plaza in Upper Mora, which latter place has been identified as the present town of Cleveland."

And yet again, on page 20 of its brief:

> "The EO stone of Means was set in a place visible from Upper Mora in the valley."

Credo quod habes, et habes. But there are difficulties here; for to entertain such belief or to make such statements, counsel for appellant must close their minds to the recitals in the field notes, the patent, the legislative act of 1868, and testimony of the witnesses, some of whom—Father Ballan, Blas Callegos, Pedro Bernal and Agapito Abeyta—testified on behalf of the Government. A mere inspection of the patent itself would seem also to be conclusive upon the point that the Estillero is a portion of the valley of the Pueblo

River. This river is a fairly large and well known stream, one of the chief tributaries in New Mexico of the Rio Grande, designated on any large map of the State. Presumably it takes its name from the Pueblo of Picuris, a prehistoric Indian settlement located upon it. From its course to its junction with the Rio Grande, it has a length of some fifty miles. The naming of it in the patent is as plain a designation of a definite stream as would be the naming of any one of the secondary streams of the State.

Another difficulty with appellant's statements is that Means, in his field notes under date of July 31, 1861, the page being headed "Upper Mora" (R., p. 97, fol. 133), says: "Having been shown the point of the mountain which is called Estillero in the Grant, by Antonio Lopez & Mr. Paiz. I took its bearing * * *." Then he sets down a northwest course and gives some distances, among the latter being the following:

> "At 5 miles 36 chains 30 links, on N. W. edge of mountain. At 6 miles, to low place in mountain. *At 7 miles, entered bottom between mountains. At 7 miles, 32.50 chains, to place called Estillero on West boundary. The point called Estillero is a low place on mountain north of a trail from Mora to Picuris.*" (Italics supplied.)

And under date of November 8, 1861 (R., p. 107, fol. 124), Means' field notes read, in part:

> "5 miles 36.35 chs. on N. W. edge of mountain. 6 miles descend to low place in mountain. *7 miles in bottom between mountains. 7 miles, 32.50 chs. to the place called the 'Estillero' pointed out to me by Jose Francisco Paiz and Manuel Antonio Paiz at this time.* * * *." (Italics supplied.)

The notes then relate the setting of the stones for the west boundary of the grant. There is no evidence that the Estillero could be seen from Upper Mora, or that Means said it could be seen from that place. The only evidence is that which we have quoted above. Means plainly reports that he set his stones at the Estillero which was 32.30 chains west of the "bottom between mountains," which in turn was seven miles, according to his report, from the plaza in Upper Mora. Just how any inference can arise that this place where Means set his stones could be seen from Upper Mora, or from the Mora Valley, is more than we care to speculate about, even assuming that Means said the Estillero was pointed out to him *from Upper Mora*. The fact is Means never said the Estillero could be seen from Upper Mora or the valley. His field notes may be searched in vain for any statement from which that meaning can even be tortured. To permit the attempted inference of visibility to weigh in this matter would be to disregard the patent location of the Estillero with reference to the Pueblo River; and that river is west of a high mountain which rears its crest nearly a thousand feet directly between the river on one side and Upper Mora on the other.

The line run by Walker in 1902—a line which answers to and is based upon the natural object and monument calls of the patent (the Estillero, the Pueblo River and the trail to Picuris; the EO stone and the stone south of the Pueblo River) and to the topography called for in the Means' field notes—this line is claimed by the appellees to be the true location on the earth's surface of the west boundary of the Mora Grant.

The statement is made in appellant's brief (p. 10) that

"both surveyors who testified for the defendants—Jol
Walker and Vincent K. Jones—admitted on cross-exa
tion (1) that the line run by Walker was a considerab
tance west of the line called for by Means' field notes
that neither of the stones found by Walker is situated
base or foot of a mountain; (3) that each stone is up o
side of a mountain quite a distance from the base; an
that the land north of the EO stone and south of the
stone could be surveyed without difficulty."

Reference to the record (*vide* p. 36, fol. 44) shows
Walker said, as to appellant's first statement, that "he di
remember the distance from the northwest corner of th
Vegas Grant to where witness' (his) line intersected
Sepello, but it was probably something like five miles; i
considerably more than Means' notes called for. *
The stones (in the Estillero) were two or three miles fa
west than the *distance* given in Means' field notes for th
tance from *Upper Mora* to the stone."

But Means' field notes, and the patent as well, in add
to calling for certain distances, also called for the Esti
the Pueblo River and the trail to Picuris; also for th
stone and a stone south of the Pueblo River; and the
fact that the Walker line may have been located farther
than the distances given by Means, or in the patent, is
moment if the natural objects and monuments called fo
the patent shall be held to control. This is a legal que
which will be discussed presently.

As to appellant's second and third statements above qu
the record shows (R., p. 36, fol. 43) that Walker said
place where the stones were found was "right at the fo
the mountain as Means' notes called for," that it was situ

"a distance of probably 100 yards up the hill above the foot of the mountain" (R., p. 37, fol. 45), and that the "southernmost stone is right at the foot of the mountain" (R., p. 37, fol. 42). Vincent K. Jones said (R., p. 39, fol. 47) "The EO stone is on a low ridge which witness would say corresponds to the call in Means' field notes, low place in the mountain." Walker also testified (R., p. 36, fol. 43) that the topography of the place where the stones were found "agreed with that given by Means in his field notes." Moreover, the fact that the stones are not found at the exact base of the mountain, which would be in the bed of the Pueblo River, but about 100 yards from its lowest point, is surely not a discrepancy worthy of serious consideration.

As to the appellant's last statement: Walker testified (R., p. 36, fol. 43) that, "He ran a line to the north of the north stone that he found, and found the character of the country extremely mountainous. There was a high mountain at the place where the northernmost stone was found, and it was quite mountainous where the southern stone was found." There is nothing in Jones' testimony about this.

With respect to the marked stones and the west boundary the District Court concluded, and its conclusions were approved by the decision of the Circuit Court of Appeals, as follows:

> "The evidence conclusively shows that the stone marked W. B. M. G. and EO (called for in the patent, and the center stone) and the stone south of the Pueblo River at the foot of the mountain are now in substantially the same place at which they were placed by Means as called for in his field notes. This was established by the evidence of old men, some of whom have known the EO stone in its present location since

the year 1866; other witnesses have known of th
stone in its present location for thirty or forty yea
* * *

"It is conclusively established by the evidence th
the west boundary of the Mora Grant called for in t
patent was established by Thomas Means, when ma
ing his official survey, at a point on the Pueblo Riv
where the monuments are now found in place an
claimed by the defendants to be the west boundar
of the Mora Grant" (R., p. 61, fol. 73).

From the foregoing rather extended review of the test
mony it appears, we submit, that upon the question of t
situation of the Estillero and the stones called for by the pa
ent as marking the west boundary, neither the District Cou
nor the Circuit Court of Appeals could have found otherwis
than they did find. It certainly cannot be fairly said, w
conceive, that it clearly appears that the lower courts erre
in their conclusions of fact. On the contrary, the evidenc
overwhelmingly establishes the conclusions of fact at whic
the lower courts arrived, and there is no substantial evidenc
to the contrary. Appellant's original theory upon which thi
case was tried and decided, that the so-called Compton lin
is the true west boundary of the Mora Grant, is not supporte
by a scintilla of testimony. That line answers to nothin
called for in the patent or in Means' field notes and it wa
run, admittedly, without reference to the patent or Means
field notes and without the slightest attempt to cause it to con
form to either the patent or the notes. It cannot be sai
that appellant has even raised a doubt herein founded o
the number and credibility of witnesses, for no such thin
is even so much as inferentially attempted. In short, if any

attack at all is made by appellant upon the findings of fact made by the trial court, it is only by the most circuitous indirection and the most tenuous of inferences. It would therefore seem that in this case the "established rule" and "settled doctrine" of this court should be adhered to and the concurrent decisions of the two lower courts upon these questions of fact followed because they are not clearly shown to be erroneous.

It is submitted that the stones found by Walker in 1902 are the stones set by Means in 1861, and that Walker found them where Means set them. A due north and south line through them, extended to the north and south boundaries of the grant, responds perfectly to the patent calls for courses, natural objects and monuments.

II.

THE CALLS OF THE PATENT FOR NATURAL OBJECTS AND MONUMENTS CONTROL THE CALLS FOR DISTANCES.

According to the patent the west boundary of the Mora Grant is a line thirty-three miles, thirty-three chains and twenty-nine links in length running due north and south through the Estillero and the marked stones therein. The northwest corner is "inaccessible in the mountains and not set," ninety miles, thirty-six chains and twenty-eight links from the beginning point at the southeast corner of the grant (R., p. 133, fol. 154). The southwest corner, according to the patent (R., p. 133, fol. 154), is "a stone twenty by fourteen by six inches in size in a mound of stones and marked S. W. C. M. G., and standing on edge of a high mountain

on left bank of the Sapello river one hundred and fif
links north of the stream." Its position was *calculat*
Means as being 2 miles, 3.10 chains due west of the
west corner of the Las Vegas Grant as established b
ham and Clements on the right bank of the Sapello
(R., p. 99, fol. 115). After so calculating, Means r
that he ran two miles 3.10 chains west of the northwe
ner of the Las Vegas Grant and there set a stone 20 x 1
inches in size and marked it S. W. C. M. G. (R., p. 10
126). This stone has never been found.

It will be remembered that the distance calls an
monument and natural object calls are in conflict,
plainly evidenced by the fact that a line (*e. g.*, the W
line of 1902) running due north and south throug
Estillero and the marked stones therein, and extendin
north and south until it intersects the north and
boundaries of the Mora Grant, places the northwest cor
which is "inaccessible in the mountains and not set"-
miles and twenty-seven chains farther west than the
distance would permit, and places the southwest cor
whose position was also *calculated and which has never
found*—about three miles farther west than the paten
tance would place it. The Compton line, which answe
patent call for objects, monuments, courses or dist
would place the northwest corner one mile, thirty
chains and eighty-eight links farther east, and the sout
corner 36.45 chains, farther west than the patent dis
call for.

As these discrepancies cannot be reconciled, either th
tance calls must give way to those for natural objects
monuments or the calls for natural objects and monu

must give way to those for distance. If control be given to natural objects and monuments—the Estillero, the Pueblo River and the marked stones—the Walker line of 1902 constitutes the correct location of the west boundary on the earth's surface, because it is a due north and south line through the Estillero and the marked stones therein. If control be given to distances, neither the Walker line nor the Compton line is correct, because neither answers the requirements as to distance and, moreover, the Compton line is not on the specified north and south course. In this situation the Government cannot, consistently with legal principles, argue that the Compton line is the correct boundary. The most it can do is to argue that the Walker line does not represent the correct boundary, even though such an argument does not assist the Compton line, in advocacy of which the Government came into court. Nevertheless, the relative value attributed by the courts to conflicting distance specifications and object and monument calls is of interest.

Ever since land surveying has been a profession, mistakes have been frequent and descriptions of land have been prepared and used in which inconsistent calls have appeared. The courts have uniformly held that courses and distances must yield to objects and monuments, and this because it is much more likely that the mistake occurred in the measurement or statement of the courses or distances. A surveyor in writing up his notes may easily write "southwest" for "northwest," or "64 degrees" for "46 degrees;" chainmen in measuring may easily report a distance as being 1,000 feet instead of 2,000 feet. Where distances are computed instead of being actually measured on the ground, as is the case with the distances called for in the patent for the Mora Grant,

substantial errors may easily creep in. But it is ex
unlikely that a surveyor will report that he reached or
a certain river when he did not in fact do so. The
and marking of stones, the marking of trees, and th
ing of a river are deliberate acts as to which the s
could make no mistake; and if the statements as t
are incorrect, it is the result of falsehood, not error.

An early case in which the situation was much li
here is *Newsom v. Pryor's Lessee*, 7 Wheat., 7, a c
by Chief Justice Marshall. The land was on Duck
in Tennessee, and the call in question in the patei
"south 894 poles to a stake, crossing the river." Th
tion was as to whether the distance stated or the call
river should control, the river being in fact 1,222 po
tant instead of 894. The circumstances of this case a
similar to those here. The court said:

> "In consequence of returning plats, wh
> actual surveys had been made, and where th
> try had been very imperfectly explored, the d
> tion contained in the patent often varies mat
> from the actual appearances of the land inten
> be acquired. Natural objects are called for, in
> where they are not found; and the same obje
> found where the surveyor did not suppose th
> be. In a country of a tolerably regular surfa
> considerable inconvenience will result from th
> cumstance. The course and distance of the
> will satisfy the person claiming under it, and
> interfere with the rights of others. But in a c
> where we find considerable water-courses and
> tains, there must be more difficulty. The su
> calls for some known object, but totally mi
> lates its courses, distances, or both, from some

point which he has made the beginning of his survey; and there is a variance in the different calls of his survey, and of the patent founded on it. As in this case, the second line is to run south 894 poles to a stake, crossing the river. This distance will not reach the river; and must be continued to 1,222 poles, to cross the river. The distance must be disregarded, and this line so extended as to cross the river, or the distance must control the call for crossing the river.

"These difficulties have occurred frequently, and must be expected to occur frequently, where grants are made without an actual survey. Some general rule of construction must be adopted; and that rule must be observed, or the conflicting claims of individuals must remain forever uncertain. The courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle, and have adhered to it. It is, that the most material and most certain calls shall control those which are less material, and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance. These decisions are founded on two considerations. Generally speaking, it is the particular intention of the purchaser, to acquire the land lying on the stream called for, as being more valuable than other land; and in every case where a natural object is mentioned, it designates the land surveyed, had there been no actual survey, much more certainly than course and distance can designate it. In this case, for example, the surveyor says that he has run south 894 poles, to a stake, crossing the river. Now, it is much more probable, that he should err in the distance, than in the fact of crossing the river. The conclusion,

therefore, had no actual survey been made, would be, that the line did cross the river.

"The general effect of this principle undoubtedly is that the purchaser acquires more land than is expressed in his grant, and more than he has paid for. Where this has been thought an object worthy of legislative attention, provision has been made for it. Courts cannot now shake a principle so long settled, and so generally acknowledged."

In passing it should be noticed that the call in question was lengthened by two-thirds of a mile so as to reach the river, and the area of the grant thereby increased by about one-sixth, a much greater increase than results from the application of the same principle to the west boundary of the Mora Grant.

This case is direct authority for our position that no survey of the west boundary of the Mora Grant can be accepted which does not reach the Pueblo River as called for in the patent.

As the rule thus enunciated by Chief Justice Marshall is a "familiar" one, *Morrow v. Whitney*, 95 U. S., 551, at p. 555, instead of setting out excerpts from the numerous authorities in which it has been phrased and applied we merely cite some of the leading ones: *McIvers, Lessee, v. Walker*, 9 Cranch, 173, 178; *Preston's Heirs v. Bowmar*, 6 Wheat., 580; *Chinoweth v. Haskell*, 3 Pet., 92; *Brown v. Huger*, 21 How., 305, 318; *County of St. Clair v. Lovingston*, 23 Wall., 46, 62; *Clement v. Packer*, 125 U. S., 309; *Ayers v. Watson*, 137 U. S., 584; *Spreckels v. Brown*, 212 U. S., 208, 218; *Silver King Coalition Mines Co. v. Conklin Mining Co.*, 255 U. S., 151.

So far as the intention of the parties is concerned, there can be no doubt that it was the intention of everyone that the west boundary of the grant should run through the Estillero. That was the original call for the grant and a line through it was the line which Means was attempting to establish. That he intended his survey to run north and south through the stones on the Pueblo River which he set at the Estillero, is an undoubted and indisputable fact. The approval of his survey and the carrying of these calls into the patent was an adoption of his intention by the Land Department of the United States.

The natural objects and monuments called for in the patent are found on the Walker line, and on no other. The distance of the line from other points is incorrectly stated. In view of the foregoing authorities, this discrepancy is unimportant.

Upon this phase of the case, the District Court said:

> "The controlling call in the patent for the west boundary of the Mora Grant being established from the evidence on the ground, that is, natural objects—the Estillero, the trail to Picuris, the Pueblo River, and the permanent monuments, stone marked EO on one side and WBMG on the other, stone marked WBMG, all now being located in the relative positions called for in the patent, these calls for natural objects and permanent monuments on the ground definitely located, they must control as the west boundary. This being established I cannot find any other facts and circumstances in this case which would constitute an exception to the general rule of law that courses and distances must yield to natural objects and permanent monuments called for in the patent.
>
> "I therefore conclude that the true west boundary

> of the Mora Grant is a north and south line dra
> through the monuments, at the Estillero on t
> Pueblo River, set by Thomas Means, in 1861, a
> found in place on the ground by J. H. Walker,
> 1902 and now in place on the ground, and the Uni
> States, by its patent for the Mora Grant, convey
> all of the lands west of the so-called Compton line
> a point where said north and south line intersects t
> north boundary of the Mora Grant and on the sou
> to a point where said north and south line reach
> the Sapello River, and the United States has no rig
> title or interest in said land."

The distances called for in the patent in the last cou
on the north and south boundaries must be extended
meet the line drawn north and south through the Estille
monuments. No "gap" results and the survey is comple

At pages 18, 22, and 23 of its brief the Government offe
to this court the suggestions that "the Estillero being giv
as one of the bounds of the grant, the survey of the lat
should extend only up to it and should not include it"; th
the Means' "survey must be rejected as fraudulent, becau
he did not survey the traverse line by which he is suppos
to have reached the place of the stones"; and that "he s
them at random and did not know where he was when h
did so." These points were not raised below and are pro
ably afterthoughts here. Moreover, the Government ca
into court and has litigated this case upon the express theo
(R., p. 3) that the west boundary as patented is the corre
boundary of the grant. In any event the suggestions r
ferred to cannot assist the appellant. The Means survey
1861 on which the patent of 1876 was issued, and which
made a part of that patent under the seal of the Unite

States and the signature of the President, ascertained the extent of the Mora Grant and separated it from the public domain. *Stoneroad v. Stoneroad,* 158 U. S., 240, at p. 251. It is binding in this court, *Stoneroad v. Stoneroad, supra; Knight v. United States Land Association,* 142 U. S., 161, at p. 176; *Cragin v. Powell,* 128 U. S., 691; *Russell v. Maxwell Land Grant Co.,* 158 U. S., 253, at p. 256, irrespective of the manner of its making; for, "However arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached." *United States v. Coronado Beach Co.,* 255 U. S., 472, at p. 488. Furthermore, by the patent "the Government declares that the claim * * * is correctly located now so as to embrace the premises as they are surveyed and described. As against the Government, this record, so long as it remains unvacated, is conclusive." *Beard v. Federy,* 3 Wall., 478, quoted with approval and as in point in *Russell v. Maxwell Land Grant Co., supra,* at p. 257.

Concluding on this phase of the case at bar, it is submitted that the calls of the patent for natural objects and monuments must control the calls for distances, and, therefore, the decisions of the two lower courts as to the location of the west boundary of the grant on the earth's surface are correct.

III.

THE TRAVERSE LINE FROM UPPER MORA TO THE ESTILLERO IS NOT A PROPER MATTER FOR CONSIDERATION; BUT, IF CONSIDERED IT WORKS AGAINST THE CONTENTIONS OF THE APPELLANT.

So far in this brief, we have, with but few exceptions, confined ourselves to a discussion of the description as con-

tained in the patent, and the argument might very properly end here. But an attack is attempted by the Government (Brief, pp. 17, 20) upon the Walker survey, and upon the boundary of the grant as claimed by the appellees, based upon the statement contained in the field notes of Thomas Means as to the distance between the Estillero and Upper Mora. Means says in his field notes that from the center of the Plaza in Upper Mora, he ran north 42 degrees, west 7 miles, 32.30 chains "to the place called the Estillero pointed out to me by Jose Francisco Paiz and Manuel Antonio Paiz at this time" at which place he set the "stone marked on east side WBMG for west boundary of Mora Grant and on west side EO for Estillero," and the other stones under discussion (R., pp. 97, 107). If it were not for this statement of distance in the field notes, in all probability the stones and natural objects called for by the patent and Means' notes would have been accepted by everybody, and this controversy would not have arisen. The importance attached to this recital by the United States requires us to give some attention to it.

It must be remembered that the patent makes no reference to this course or distance. It fixes the west boundary by the call for the marked monuments, the Pueblo River and the other natural objects, and there was no reason why a tie should be made from them to a point over seven miles away. Throughout the trial of this case it was, and it still is, our contention that the boundary must be determined by the calls given in the patent and that it is not proper to confuse them by importing extraneous matter from Means' field notes or from any other source. The patent speaks for itself. Unless the description contained in it is so ambigu-

ous that the land conveyed by it cannot be identified, it needs no assistance from elsewhere.

The use of the call for the distance from Upper Mora gives no support to the contention of the United States for the Compton line. The Government claims at one moment that the Compton line is the "true" west boundary of the grant and at the next that the important call in determining the west boundary is the distance stated in the Means' field notes from that boundary to Upper Mora, totally disregarding the fact that the boundary if fixed in this way would fall several miles to the west of the Compton line.

In addition to the fact that this course and distance are not called for in the patent, and that even if called for in the patent they would be controlled by the natural objects and permanent monuments called for, there are other reasons why they should be disregarded.

The traverse line (R., pp. 94-99) of which the tie from Upper Mora was part, commenced at a mound of earth south of the Black Lake which was referred to in the testimony as MC 13. This mound has now disappeared, at least none of the several surveyors who searched for it and who testified in this case was able to find it, so that the very beginning point of the traverse line is today uncertain. Wherever that point may have been, it is a physical impossibility to run out upon the surface of the earth this meander line as given in the Means' field notes and make it check with any of the points for which he calls. Whether this is because he did not actually run the line, or because he made frequent mistakes in his notes, or in transcribing them into the copy which we now have, we do not know

and there is no way of determining. But that the copy of the notes which we now have is inaccurate, we do know.

Mr. Kirkpatrick, a witness for the Government, who attempted to retrace the traverse, says he "could not follow Means' courses and remain in what would be the natural course of the survey down the canyon. It appeared to witness that Means had made many mistakes or had adjusted his courses and distances so witness abandoned the line" (R., p. 30). And later on the same page he states that it was apparent to him that Means did not run on the courses stated in his field notes. The same conclusion was reached by Jones (R., p. 44).

The Means traverse from Upper Mora to the Estillero, as we have it today, is confessedly not the result of an actual survey, but of a computation made from other lines of which we have no record. Means' own statement regarding it to the effect that he ran the line which, with the other portion of the traverse, made a total distance of more than 23 miles, all in one day, over a rough and mountainous country, at some points reaching a height of over 10,000 feet, is the statement of a manifest impossibility. At least it was then and is now an impossibility for any man to run such a line for such a distance with anything like accuracy. The inherent facts with regard to the traverse line and Means' own statement themselves are the refutation of its reliability. A mathematical computation made from an erroneous basis must result in an erroneous conclusion. These facts alone are sufficient to justify the court in disregarding the traverse line entirely.

The only attempt made by any of the witnesses who testified in this case actually to reconstruct in an intelligent

manner the work done by Thomas Means was that made by Vincent K. Jones. His testimony was not introduced primarily for the purpose of supporting the Walker line, for it all refers to matters not contained in the patent and therefore, in our view of the case, not properly cognizable in reaching a decision. But on the trial of the case, the Government was allowed to attack the location of the Walker line by showing that it did not correspond with the distance given by Means from Upper Mora. To rebut this, appellees proved by the testimony of Mr. Jones that the Means traverse, corrected so as to conform to natural objects which he calls for on his line, does reach approximately the monuments which he set on the Pueblo River. The other surveyors who tried to retrace the traverse commenced at the point known as MC 13, although they were unable to find the monument which should have been there and consequently this point was necessarily indefinite, and although it is many miles away from the Estillero which they were attempting to relocate. Mr. Jones adopted (R., pp. 40, 41) a much more reasonable course. He took for his starting point the last fixed point on the line, the nearest fixed point to the Estillero, the court house in the Town of Mora (R., p. 96). If the Estillero is to be determined by courses and distances from any point, it would seem to be common sense to refer it to the nearest known point, and in this respect surveying rules and common sense seem to agree. Means, in his field notes of the traverse line states that at a certain point he was at a distance of 155 chains, or about 2 miles, from the court house in Mora, which bore south 50¾ degrees east. It is true that the court house is not on the line; but it is nevertheless a point to which the line was tied; and as to its being a "fixed" point, it may be

stated that the building which was there in 1861 still st
The point on Means' line which is at the required dis
and on the specified course from the court house is easi
certainable. It is this point which Mr. Jones took in h
tempt to relocate the Estillero according to the Means
notes of his traverse line.

Means states that at a certain point on his twelfth co
run July 31, 1861 (R., p. 96), the court house in the
of Mora was south 64 degrees west a certain distance and
from such point on his twelfth course he ran north 80¾
grees west, crossing the Mora River at 21½ chains.
Jones, after establishing the beginning point, ran out t
two courses as called for and found that instead of bei
the Mora River he was on top of a mesa about two miles
from the river and six or eight hundred feet above it (R
40). He therefore concluded that there must be some
in one or both of these courses. Furthermore, the Estil
which Means was then attempting to reach, lay in a ge
northwest direction from the point where he was then st
ing and there was no reason why in attempting to go to
should run southwest instead of northwest (R., p. 40).
Jones concluded that the probable error was in writing
degrees and in giving this course as southwest instea
northwest. He, therefore, ran the first course northwe
degrees instead of southwest 64 degrees, ran out the se
course as called for by Means, and found that in this wa
crossed the Mora River at the point stated by Means.
practice of thus changing courses and distances to con
to natural objects is a common one and was adopted at va
times by the several surveyors who testified in this case
pp. 13, 20, 41). From the crossing of the Mora Riv

thus determined, Mr. Jones ran out the Means traverse absolutely in accordance with his field notes, making no variation whatever from them (R., p. 41), and found that his line struck the settlement of Canoncito at approximately the place designated by Means as Upper Mora. From Canoncito he continued the traverse in accordance with Means' field notes and found that it terminated within ten chains of the actual location of the EO stone at the Estillero in the Valley of the Pueblo River (R., p. 41).

The map prepared by Mr. Jones showing the traverse run out in accordance with the field notes of Means, without change, and also showing the same line run out with the change of one course so as to conform to the crossing of the Mora River is in the record at page 153, as Exhibit G. It also shows the relations of these lines to the topography of that section of the country. From it, as well as from the testimony, it will be seen that the settlement of Canoncito checks with the location of the place which Means calls Upper Mora, and if the identity of these two places be assumed, the EO stone is again in its proper location according to the Means traverse.

The various surveyors who have attempted to reconstruct the Upper Mora-Estillero traverse on behalf of the United States have agreed in taking the town of Cleveland as their starting point, they assuming that it is the Upper Mora called for by Means; and appellant in its brief (p. 17) goes the length of saying that Upper Mora "has been identified as the present town of Cleveland." These are pure assumptions. While it is true, according to the testimony of certain witnesses for appellant, that the present town of Cleveland was known as Upper Mora, it is equally true, according

to the testimony of the same witnesses, that this name wa applied to all the upper portion of the Mora Valley, whic included the Town of Canoncito, as well as Cleveland, with out discrimination as to any particular settlement therei (R., p. 33). There is no reason whatever for assuming that the present town of Cleveland is the old town of Upper Mora that does not apply equally to the present town o Canoncito. The town of Cleveland is not on the course nor at the distance called for by Means from the court house in Mora, whether that course and distance be shown accord ing to the actual condition of those field notes or whether they be corrected in accordance with Mr. Jones' reconstruc tion of them. A line run according to the actual field notes misses the town of Cleveland by a considerable dis tance (Exhibit G, p. 153). *The town of Canoncito is on the Means course, as reconstructed by Jones, and at the distance stated by Means between Upper Mora and the stone which he set. Cleveland is not on that course nor at that distance.* There is no excuse for taking the town of Cleve land for the starting point for this traverse and no reason for so doing. Upon this feature of the case, the district court said:

> "The evidence as to the present location of Upper Mora is unsatisfactory. I cannot say from this evi dence that the present town of Cleveland is what was known in 1861 as Upper Mora. The only conclu sion to be reached from the evidence on this point is that all of the upper valley was known as Upper Mora in which there were several small settlements. Tak ing Means last bearing for a permanent object before reaching what he called Upper Mora, a tie on the course was made to the old court house in Lower

Mora, which is now standing, and which he reports as bearing S. 50¾ E. and distant 155 chains.

"The evidence shows after locating this point, at which he tied to the old court house in Mora on the course on the ground and following the courses and distances given by Means by changing his course from southwest to northwest, 'S. 64 degrees W. 206.25 chains,' changing 64 degrees to 46 degrees, following this changed course they ran through the little town of Canocito, which is probably the place that Means designated as Upper Mora.

"A line running from Canoncito for the distance and on the course given by Means in his field notes from Canoncito to the Estillero monument will reach a point within 10 chains of the present location of the Estillero monument. A line run from Canoncito to the Estillero monument on the course given by Means in his field notes passes over mountains and country which in the greater part corresponds to the topography of the country which Means states he ran over between these two points" (R., p. 62).

While we still insist that the Upper Mora-Estillero traverse is not a proper matter to be considered in determining the west boundary of the Mora Grant, it is demonstrated that if considered it works for and not against the acceptance of the line drawn through the marked stones in the Estillero. By no possible stretching of construction can it be made to conform in any respect whatsoever to the Compton line, as claimed by the United States, or to any point on it.

IV.

THE TRIAL COURT DID NOT COMMIT ERROR IN LIMITIN THE EFFECT OF THE PLATS AND FIELD NOTES OF OFFICIA SURVEYS OF TOWNSHIPS ADJOINING THE MORA GRANT, NO IN EXCLUDING LAND DECISIONS AS TO THE LOCATION OF TH MORA-GRANT BOUNDARY.

As has already been stated, Compton in running his lin was not attempting to re-establish the grant boundary. H was retracing the east boundary of certain fractional town ships which were supposed to close on the grant. He tes tified that in running this line he found various section corners and witness trees. Counsel for plaintiff then offered the field notes of the township surveys which the witness said he was attempting to follow. They were admitted for the purpose of showing that the Compton line coincided with the lines as fixed by former township surveys, so that the existence of these surveys was before the court. It is apparently the contention of appellant (Brief, pp. 12, 15) that they were also admissible to show that the Interior Department in the survey of its adjoining land, independent and apart from the survey on which the Mora Grant patent was based, and made long afterwards, conclusively fixed the boundary line between its lands and its neighbor's and no judicial review of its action is possible. In the same way they argue that the court should have received the decisions of the Interior Department as to the location of the boundary. Cases are cited to the effect that the power to make and correct surveys of public lands belongs to the political department of the Government. That is, of course, true so long

as they are public lands; but when the Government has once parted with title and the land is in private ownership, its power over the question of boundary ceases and the location of the dividing line between the public domain and the lands of the private citizen immediately becomes a judicial one. Individual and vested rights having come into existence, they must be determined by the proper tribunals; they cannot be destroyed by the arbitrary action of an interested administrative department. The views of the Secretary of the Interior as to the proper location of this line are of no evidentiary value and have no probative effect before a court. "As the United States already had conveyed the lands it had no jurisdiction to muddle with them in the form of a second survey." *Kean v. Calumet Canal Co.*, 190 U. S., 452, at p. 461.

The latest case on this subject is *Lane v. Darlington*, 249 U. S., 331, in which the right of the United States to make new surveys and their effect when made, is defined as follows:

> "So long as the United States has not conveyed its land, it is entitled to survey and resurvey what it owns, and to establish and re-establish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, 'the courts can then, in the appropriate proceeding, determine who has the better title or right.'"

V.

THAT THE COURTS HAVE NEITHER ORIGINAL POWER NO POWER CONCURRENTLY WITH THE LAND DEPARTMENT T CORRECT SURVEYS, IS AN ELEMENTARY PRINCIPLE OF OU LAND LAW.

Beginning at page 23 of its brief, the appellant injec another suggestion into this case. Upon the assumption that the Means survey has been discredited and that thi court may so consider it, the suggestion is made that th court now order a new survey to be made in accordance wit the plat and field notes, provided the court is not satisfie with the Compton survey.

There are obviously three infirmities in this suggestion each of which is fatal. The issues were made up and th case has been thus far tried upon appellant's assertion tha the patented west boundary is correctly represented by th Compton survey, and that theory cannot now be controverte by appellant. Secondly, the lower courts have decided tha the boundary runs north and south through the Estiller and the marked stones therein. The ultimate query i therefore, should that decision be sustained or overthrown and not, should this court order another survey? Moreove the proposition that the courts have neither original no concurrent power with the Land Department to correct sur veys, "if not an elementary principle of our land law, i settled by such a mass of decisions of this court that its mer statement is sufficient." *Cragin v. Powell*, 128 U. S., 691 at p. 699, and cases there cited; *Stoneroad v. Stoneroad*, 15

U. S., 240, 250, 251; *Knight v. United States Land Association*, 142 U. S., 161, 176.

United States v. Redondo Development Co., 254 Fed., 656, cited by appellant is not in conflict with the principle last above mentioned. In that case the trial court refused an injunction, sought by the government, to prevent the fencing of and the cutting of timber on land between the boundary of Baca Location No. 1, a float, as marked upon the ground by government surveyors, and the boundary as shown in the official field notes and plat, which were fair on their face. The granting act, Act of June 21, 1860, c. 167, 12 Stat. 71, specified that the grant should contain 99,328.39 acres. According to the official survey and plat of 1876, it contained the specified acreage, but "it was discovered that the marks upon the ground of the survey of 1876 were grossly inaccurate;" so inaccurate that within them the grant contained nearly 10,000 acres less than the required quantity. So, said the court, it was "quite apparent that a considerable part of the exterior lines was not traversed at all by the surveyor" (p. 658). In addition to denying injunctive relief, the trial court also "permanently established defendant's survey as defining the true boundaries of the location."

The Circuit Court of Appeals affirmed that part of the decree which denied injunctive relief. As to the part establishing defendant's private survey as defining the true boundaries, the court said that, "the decree went too far. The making and correction of surveys of public lands belongs to the political department of the government" (p. 660). Accordingly, the decree was modified "so that the dismissal of the complaint upon the merits be without prejudice to the right of the government to make a correct resur-

vey by marking the true boundaries upon * * * th ground according to the selection and location, the field notes and plat of 1876, and to contain the area so specified and when so made to require the defendant to adjust it enclosure accordingly."

There was no patent involved in the case as none had ever been issued.

VI.

SUCH STATEMENTS IN APPELLANT'S BRIEF AS ARE NOT BASED ON THE RECORD WILL DOUBTLESS NOT BE GIVEN CONSIDERATION.

We hesitate to close without referring to some statements made in appellant's brief by way of what may perhaps be called non-legal argument, although if true—which we do not admit—they can have no bearing on the decision. On page 1 of the Government's brief it is said that the United States "has been in possession of the land ever since the acquisition of the Territory of New Mexico in 1848;" on page 25, it is said: "It should not be overlooked that the line run by the deputy surveyors in 1882 has been regarded as the west boundary of the grant from the time it was run until the question was agitated by the grant claimants about the year 1907, a period of some 25 years;" on the same page, and immediately following the excerpt last given, it is said that, "During all that time the land here involved was regarded as public land of the United States and administered accordingly;" on page 13, that "From the time of the public land surveys in 1882 until 1902, * * * the line run in 1882 was not questioned as the west boundary

of the grant;" and on page 26, that the grant claimants have never been in possession of the land in controversy and for twenty-five years subsequent to 1882 they set up no claim to it. Incidentally, it may also be noted that appellant bears down on the assumptions that the area surveyed by Means was in satisfaction of a "small community grant" (Brief, pp. 4, 5), and that the owners "have received an area enormously larger than that granted by the Mexican authorities, and have no cause to complain" (Brief, p. 26).

The most careful and accurate search of the proceedings in this case will disclose no vestige of proof upon which to base the statements appellant makes as to possession of the disputed strip, acquiesence in the line run in 1882, failure to question that line, or when the grant claimants first made claim to the land in controversy. The record is devoid of any such proof. There is no plea of limitations, or laches, or estoppel; and questions of possession, use or claim of right were not and could not have been raised or litigated in the lower court. Whatever efforts the grant owners may have made for years to clear the title to the property are not disclosed by the record, but its silence in that respect does not indicate that there were none. It is, of course, improper for us to state the facts. We must rest content with the suggestion that the statements referred to were made by counsel, not by witnesses or records.

As to the Means survey being in satisfaction of a "small community grant" and the grant claimants having received "an area enormously larger than that granted by the Mexican authorities," the Mexican grant was not an area grant but a grant by metes and bounds; and assuming, *arguendo* only, that the statement of appellant is true, still appellant

is without remedy; because the grant was confirmed by Congress, *Maxwell Land Grant Case*, 121 U. S., 325, 366. But this grant was segregated from the public domain and its extent ascertained by the Means survey as approved by the Land Department, *Stoneroad v. Stoneroad*, *supra*, and upon that approved survey the solemn patent of the United States, "an instrument of quiet and security," *Whitney v. Morrow*, 112 U. S., 693, 695, was issued declaring that the grant "is correctly located now so as to embrace the premises as they are surveyed and described." *Russell v. Maxwell Land Grant Co.*, *supra*. "As against the Government, this record, so long as it remains unvacated, is conclusive." *Beard v. Federy*, *supra*. It would hardly seem that the Government can now with good grace say that the owners have received more than the Mexican grant called for.

Conclusion.

In closing its brief, appellant says that, "The boundary was fixed by the public-land survey of 1882 and should not be distributed." This is a frank statement, and its meaning is clear. Since in 1882, an *ex parte* survey of adjoining public lands was made under authority of the Land Department, the door of inquiry, they say, is closed, and controverted questions are forever adjudicated, even though that survey resulted in a line which conforms to nothing found in the patent to the Mora Grant, the correctness of which patent the Government has asserted and relied upon until now. As against this, the appellees stand upon the patent issued in 1876, and demand the boundary which that patent gives.

is submitted that the decree herein is clearly right and
ld be affirmed.

Respectfully submitted,

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CEMBER, 1923.

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